

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

HARRY JAMES SMISKIN and KATO
SMISKIN,

Defendants.

NO. CR-04-2107-EFS
NO. CR-04-2108-EFS

**ORDER DENYING GOVERNMENT'S
MOTION FOR RECONSIDERATION**

BEFORE THE COURT, without oral argument, is the Government's Motion for Reconsideration. (CR-04-2107-EFS: Ct. Rec. 53; CR-04-2108-EFS: Ct. Rec. 56.) On June 24, 2005, the Government moved the Court to reconsider its May 31, 2005, Order (CR-04-2107-EFS: Ct. Rec. 52; CR-04-2108-EFS: Ct. Rec. 55) granting Defendants' Motions to Dismiss (CR-04-2107-EFS: Ct. Rec. 21; CR-04-2108-EFS: Ct. Rec. 19). After thoroughly reviewing all materials related to the Government's motion and relevant legal authority, the Court is fully informed and denies the Government's request to withdraw its May 31, 2005, Order and to reinstate the criminal charges dismissed in that Order.

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1 **A. Background**

2 Defendants Harry Smiskin and Kato Smiskin, both enrolled members of
3 the Confederated Tribes and Bands of the Yakama Nation (the "Yakama
4 Tribe"), were indicted on charges of violating the Contraband Cigarette
5 Trafficking Act ("CCTA"), 18 U.S.C. § 2342(a). (CR-04-2107-EFS: Ct. Rec.
6 1; CR-04-2108-EFS: Ct. Rec. 1.)

7 Defendants challenged their indictments in separate but related
8 Motions to Dismiss. (CR-04-2107-EFS: Ct. Rec. 21; CR-04-2108-EFS: Ct.
9 Rec. 19.) In general, Defendants argued they could not be prosecuted
10 under the CCTA for failure to pre-notify Washington State of their intent
11 to transport unstamped cigarettes because the pre-notification
12 requirement violated their right to travel under the Yakama Treaty of
13 1855 (the "1855 Treaty"). On May 31, 2005, finding Defendants' alleged
14 illegal conduct was protected under the 1855 Treaty, the Court granted
15 Defendants' motions and dismissed the CCTA criminal charges against them.
16 (CR-04-2107-EFS: Ct. Rec. 52; CR-04-2108-EFS: Ct. Rec. 55.)

17 **B. Federal Laws of General Applicability**

18 The Government urges the Court to withdraw its May 31, 2005, Order
19 and reinstate the CCTA charges Defendants. In doing so, the Government
20 primarily relies on the Ninth Circuit's opinion in *United States v.*
21 *Farris*, 624 F.2d 890 (9th Cir. 1980), and a general explanation of why
22 the CCTA, a federal law of general applicability, applies to the Yakama
23 Tribe. Meanwhile, Defendants continue to believe they are exempt from
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1 prosecution arguing that application of the CCTA to their respective
2 cases, would abrogate rights guaranteed to Defendants by the 1855 Treaty.

3 It is undisputed that federal laws of general applicability such as
4 the CCTA are "presumed to apply with equal force to Indians." *United*
5 *States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995). However, under a
6 clearly stated exception, a federal law of general applicability "that
7 is silent on the issue of applicability to Indian tribes will not apply
8 to them if . . . the application of the law to the tribe would abrogate
9 rights guaranteed by Indian treaties. . . ." ("Treaty Exception"). *Id.*
10 at 1485 (citing *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113, 1115
11 (9th Cir. 1985)).
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13 In *Farris*, the Ninth Circuit held the Organized Crime Control Act
14 ("OCCA"), also a federal law of general applicability, could be used to
15 prosecute Puyallup Tribal members involved in a gambling business deemed
16 illegal under Washington State law. *Farris*, 624 F.2d at 892-894. In the
17 course of making its decision, the Ninth Circuit reviewed the Puyallup
18 Tribe's treaty with the United States Government (the "Treaty of Medicine
19 Creek") and determined the Treaty Exception did not prohibit the OCCA's
20 application against Puyallup members because the Treaty of Medicine Creek
21 did not contain "specific language permitting gambling or 'purporting to
22 exempt Indians from the laws of general applicability. . . ." *Id.* at
23 893. Moreover, the court noted "general treaty language such as that
24 devoting land to a tribe's 'exclusive use' is not sufficient" to bring
25 the Treaty Exception into play. *Id.*
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1 Based on *Farris*, the Government does not believe Defendants are
2 exempt from complying with the CCTA because the 1855 Treaty does not
3 contain specific language permitting the transportation of contraband
4 cigarettes. Instead, in relevant part, the 1855 Treaty simply states
5 that Yakama Tribal members have "the right, in common with the citizens
6 of the United States, to travel upon all public highways" (the "Right to
7 Travel Clause"). Treaty with the Yakamas, 12 Stat. 951 (1855). As the
8 Government insists, nowhere in the 1855 Treaty, let alone the Right to
9 Travel Clause, is the transportation of contraband cigarettes explicitly
10 discussed.
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12 The Court recognizes the significance of the *Farris* opinion as it
13 relates to the CCTA charges brought against Defendants. In *Farris*, as
14 is the case here, all defendants were charged under a federal statute in
15 which a necessary element of the offense was determined by state or local
16 law. Specifically, the OCCA provides: "Whoever conducts, finances,
17 manages, supervises, directs, or owns all or part of an illegal gambling
18 business shall be fined. . . ." *Farris*, 624 F.2d at 892 (quoting 18
19 U.S.C. § 1955(a)). Furthermore, the OCCA states that "illegal gambling
20 business," as used above, "means a gambling business which is a violation
21 of the law of the State or political subdivision in which it is
22 conducted." *Id.* (citing 18 U.S.C. § 1955(b)). This is similar to the
23 CCTA, under which it is "unlawful for any person knowingly to ship,
24 transport, receive, possess, sell, distribute, or purchase contraband
25 cigarettes," 18 U.S.C. § 2342(a), and "contraband cigarettes" are defined
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1 in part as certain cigarettes possessed by persons not authorized to
2 possess them under state law, 18 U.S.C. § 2341(2). Thus, under both the
3 OCCA and the CCTA, a defendant may be convicted only if it is proved he
4 or she was engaged in certain conduct prohibited by state law.

5 In *Farris*, the Ninth Circuit determined that no specific language
6 in the Treaty of Medicine Creek specifically guaranteed Puyallup Tribal
7 members the right to operate what would be an illegal gambling business
8 under Washington State law. Although, the court in *Farris* stated that
9 "general treaty language such as that devoting land to a tribe's
10 'exclusive use' is not sufficient" to protect Puyallup Tribal members
11 from OCCA prosecution, no explanation was given as to why the clause,
12 assuming it was contained in the Treaty of Medicine Creek, did not
13 provide such protection. *Farris*, 624 F.2d at 893.

14 In this case, the Court's dismissal of the CCTA charges against
15 Defendants is easily reconciled with the outcome in *Farris* by virtue of
16 the fact the *Farris* opinion dealt with a different treaty and addressed
17 different rights. Additionally, rather than merely containing a general
18 clause relating to the exclusive use of land as found in the Treaty of
19 Medicine Creek, the 1855 Treaty contains a more detailed clause that sets
20 forth a specific right to travel. Additionally, the Right to Travel
21 Clause has been the subject of an extensive interpretative process that
22 included numerous findings of fact and conclusions of law relating to the
23 rights protected by Right to Travel Clause, see *Yakama Indian Nation v.*
24 *Flores*, 955 F.Supp 1229 (E.D. Wash. 1997), which was ultimately affirmed
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1 by the Ninth Circuit, *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998).
2 The Court continues to believe its initial determinations were correct
3 and that the Right to Travel Clause, as clarified by the Ninth Circuit
4 in *Cree*, 157 F.3d 762, satisfies the "specific language" requirement
5 described in *Farris*.

6 **C. Legal Goods**

7 The Government claims the cigarettes seized from Defendant Harry
8 Smiskin's property were not "legal goods" because no steps were taken by
9 Defendants to make them legal. The Court rejects this proposition.
10 Unstamped cigarettes in Washington State are not deemed "contraband"
11 under the CCTA if they are in the possession of a person authorized by
12 state law to possess them. For reasons explained in the Court's May 31,
13 2005, Order, Yakama Tribal members are authorized to possess and
14 transport unstamped cigarettes regardless of whether they pre-notify
15 Washington State of their intention to transport them. Thus, Defendants,
16 as Yakama Tribal members, were not required to do anything, as suggested
17 by the Government, to convert the cigarettes allegedly in their
18 possession from contraband to legal goods.
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20 **D. Pre-Notification as an Affirmative Defense**

21 The Government next argues the pre-notification exception is an
22 affirmative defense that must be proved by Defendants before what are
23 otherwise deemed contraband cigarettes become legal goods. The Court
24 rejects this argument on the basis of the Court's earlier determination
25 the pre-notification process does not apply to Defendants. Even if pre-
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1 notification is an affirmative defense that must be proved by typical
2 CCTA defendants, it is not a defense useful to Defendants in this case
3 because the pre-notification requirement does not apply to them.

4 **E. Minimal Burden Test**

5 The Government also reasserts its belief the "minimal burden test"
6 found in *Washington v. Confederated Tribes of the Colville Indian*
7 *Reservation*, 447 U.S. 134 (1979), should be employed in this instance to
8 determine whether the Washington State pre-notification process applies
9 to Defendants despite the terms of the 1855 Treaty. The Court once again
10 rejects this argument. Although several treaties, including the 1855
11 Treaty, were briefly discussed in the *Colville*, the opinion merely
12 discusses states' authority to impose minimal burdens on tribes'
13 sovereignty rights, which arise independent of treaties. *Id.* at 156.

15 **E. Pandora's Box**

16 Finally, the Government expresses its continued belief the Court's
17 May 31, 2005, Order permits Yakama Tribal members to transport *all* goods,
18 including forbidden fruits, vegetables, plants, and animal, regardless
19 of any state regulations. As was the case when Defendants' Motions to
20 Dismiss were heard, the Court is not persuaded by the Government's
21 "Pandora's box" analogy. While the Court's May 31, 2005, Order does
22 prohibit the Government from prosecuting Yakama Tribal members under the
23 CCTA in certain situations, nothing in the Order restricts Washington
24 State's ability to keep roadways safe and open for travel or from
25 continuing to regulate the possession or transportation of other goods.
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1 Accordingly, **IT IS HEREBY ORDERED:** Government's Motion for
2 Reconsideration (**No. CR-04-2107-EFS: 53; No. CR-04-2108: Ct. Rec. 56**) is
3 **DENIED.**

4 **IT IS SO ORDERED.** The District Court Executive is directed to enter
5 this order and to provide copies to all counsel.

6 **DATED** this 24th day of October, 2005.

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8 S/ Edward F. Shea
9 EDWARD F. SHEA
10 United States District Judge

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